

NO. 20035

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED CALIFORNIA BANK, a
California corporation,

Appellant,

-vs-

JOHN M. ENGLAND, as Trustee
in Bankruptcy of FELDEN
INDUSTRIES, INC.,

Appellee.

REPLY BRIEF FOR APPELLANT

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*See also
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INDEX

	Page
Jurisdictional Statement	1
Facts of this Case	1
Argument	3
Conclusion	7
Certificate	
Proof of Service by Mail	

TABLE OF CITATIONS

Bankruptcy Act	Page
Section 70(c) (11 U.S.C. Sec. 110)	4
California Civil Code	
Section 2957	3,4,5,6
Cases:	
<u>Talcott v. Hurlbert,</u> 143 Cal. 4, 76 Pac. 647	4,6

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On appeal from the United States District Court
for the Northern District of California,
Southern Division.

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is set forth in Opening Brief
for Appellant and incorporated herein for all purposes.

FACTS OF THIS CASE

The facts of this case have been heretofore set forth in
Appellant's Opening Brief.

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FACTS OF THIS CASE

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Appellant's Opening Brief.

Appellee has included additional facts in its Reply Brief (pp. 3 & 4) concerning the existence of a creditor, CYCLONE SANDBLAST EQUIPMENT COMPANY, which were not touched upon by Appellant in its Opening Brief. This omission was not designed to mislead the Court in any manner. Prior to the assumption of the liabilities of METAL FAB by the Bankrupt, METAL FAB was indebted to CYCLONE SANDBLAST EQUIPMENT COMPANY. (SUPP. TR 8-10). At the time of the assumption of liabilities of METAL FAB by the Bankrupt and while the chattel mortgage was duly recorded in Alameda County, CYCLONE SANDBLAST EQUIPMENT COMPANY remained a creditor of METAL FAB and became a creditor of the Bankrupt. (SUPP. TR 7, 8, 10, Exhibit I). CYCLONE SANDBLAST EQUIPMENT COMPANY did not have actual knowledge of the existence of the mortgage but had constructive notice of the mortgage by virtue of the recordation of said chattel mortgage, said chattel mortgage having been recorded on August 2, 1963, in the County of Alameda, State of California. CYCLONE SANDBLAST EQUIPMENT COMPANY did not release METAL FAB from its debts and to date remains a creditor of METAL FAB. (TR-10). METAL FAB, Mortgagor, is not a party to the proceedings before this Court.

Appellee has stated as a fact that METAL FAB is, at most, a hollow corporate shell. (Appellee's Reply Brief p.2).

There is nothing in the record to support this gratuitous statement.

Appellee has stated as a fact: "Appellant negligently permitted a secret lien to arise. (TR 8)." Reply Brief of Appellee, (p. 3). This is a conclusion of law made by Appellee and not a statement of fact supported by the record.

ARGUMENT

Appellee has consistently failed to squarely meet the argument of Appellant concerning the construction of CALIFORNIA CIVIL CODE, Section 2957, as to what persons are protected by the provisions thereof. This section is set forth at length in Appellant's Opening Brief on p.5. The classes of persons specified are "creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value."

In this proceeding CYCLONE SANDBLAST EQUIPMENT COMPANY is a creditor of FELDEN who is not the mortgagor and not a creditor of METAL FAB (who is the mortgagor). As a creditor of FELDEN it is a creditor of the assignee of the mortgagor (METAL FAB), and not within the classes protected by the statute. Whether it would be in the class protected by the statute in a proceeding wherein METAL FAB is the bankrupt is a question that is not germane to this proceeding, particularly since METAL FAB is not involved herein.

In order to further clarify the issues involved in this appeal Appellant will divide the types of creditors into two classes:

- (1) Creditors of FELDEN who are not also creditors of METAL FAB;
- (2) Creditors of FELDEN who are also creditors of METAL FAB.

Assuming, for purpose of example only, and not for any other purpose, that by virtue of Section 70 (C) of the Bankruptcy Act, the Trustee (Appellee) has been vested with all the rights, remedies, and powers of a creditor of FELDEN, let us analyze what are the rights of the two classes of creditors.

Class (1) creditors (creditors of FELDEN who are not also creditors of METAL FAB) would have absolutely no standing to challenge the validity of the chattel mortgage since Class (1) creditors are not "creditors of the Mortgagor" within the purview of Section 2957 of the CALIFORNIA CIVIL CODE. Talcott v. Hurlbert, 143 Cal. 4, 76 Pac. 647 (1904).

Class (2) creditors (creditors of FELDEN who are also creditors of METAL FAB, such as CYCLONE SANDBLAST EQUIPMENT COMPANY) became creditors prior to the purchase-sale agreement between METAL FAB and FELDEN, dated August 29, 1963. There is no evidence in the record to show

It is noted that the majority of the evidence

in this case is circumstantial and that the fact is

that the evidence is circumstantial.

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that there are creditors of METAL FAB who are also creditors of FELDEN in this proceeding whose claims arose after the purchase-sale agreement of August 29, 1963, while the property was located in San Mateo County. As to those creditors whose claims arose prior to August 29, 1963 (which would include CYCLONE SANDBLAST EQUIPMENT COMPANY) the chattel mortgage is a valid and subsisting lien since the mortgage was recorded in Alameda County as is required by Section 2957 of the California Civil Code. The failure to re-record the mortgage in San Mateo County could not possibly prejudice their position, since at the time they advanced credit to METAL FAB there was a valid and subsisting lien on the chattels in the form of the chattel mortgage which was recorded in the County of Alameda, the locus of the property while in the possession of METAL FAB.

Appellant has shown that as to Class (1) creditors the Trustee would have no standing to challenge the validity of the mortgage, for in no sense are they "creditors of the mortgagor".

As to Class (2) creditors the Trustee does not have a standing to challenge the chattel mortgage, because if he "steps into the shoes" of the creditors he puts himself in the position of being a creditor who could not challenge

the validity of the chattel mortgage by reason of the fact that as to those creditors the mortgage was a valid and subsisting lien on the mortgage property.

APPLICABILITY OF TALCOTT v. HURLBERT

Appellee has gone to great lengths to distinguish the decision in Talcott v. Hurlbert, 143 Cal. 4, 76 Pac. 647 (1904). This case was cited for the proposition that the words "creditors of the Mortgagor", as used in CALIFORNIA CIVIL CODE, Section 2957, meant creditors of the Mortgagor and not creditors of the assignee of the Mortgagor. A close reading of the decision will show that this construction of the statute was the grounds of decision. The case was not decided on the grounds that there were no creditors of the Mortgagor before the Court as the Appellee would lead you to believe. The heart of the decision reads as follows:

"It is clear, under the above section (Section 2957, CALIFORNIA CIVIL CODE,) that the mortgage to Hall was void as to any creditor or creditors of the Mortgagors Hurlbert and Woolfolk. But it was not void except as to the classes of persons named in the section. Here there is no creditor of the Mortgagors before the Court as such. We cannot extend the words of the statute to parties not included in the classes named in it. The corporation succeeded to the property

mortgage, but this did not make the corporation a mortgagor". . . . (emphasis added).

CONCLUSION

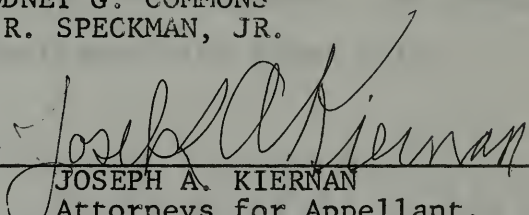
For the reasons stated, it is respectfully submitted that the District Court's Order adopting the Order of the Referee in Bankruptcy dated January 12, 1965, be reversed and the Chattel Mortgage be declared a valid and subsisting lien on the property.

DATED: April 22, 1966.

Respectfully submitted,

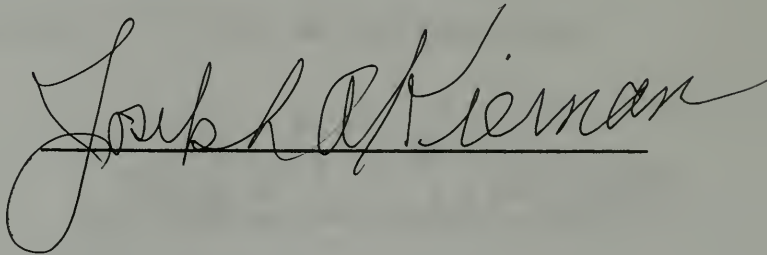
JOHN K. DERHAM
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By


JOSEPH A. KIERNAN
Attorneys for Appellant.

C E R T I F I C A T E

I hereby certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) SS.

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is:

405 Montgomery Street
San Francisco, California 94104

On April 22, 1966, I served the within OPENING BRIEF FOR APPELLANT on the interested parties in said action, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail addressed as follows:

ROTHSCHILD & PHELAN
155 Montgomery Street
San Francisco, California, 94104

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 1966, at San Francisco, California.

Joseph A. Kieman

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, the undersigned, a duly qualified and licensed
Notary Public in and for the County of Los Angeles,
do hereby certify that the within and foregoing
instrument is a true and correct copy of the
original instrument as the same appears from the
records of said County.

Notary Public
My Comm. Expires 12/31/2011

Witness my hand and the seal of said County
at Los Angeles, California, this 1st day of
January, 2011.

Notary Public
My Comm. Expires 12/31/2011
10101

I hereby certify that the within and foregoing
instrument is a true and correct copy of the
original instrument as the same appears from the
records of said County.

Notary Public

Notary Public